IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH MIKE, :
Plaintiff :
:
V. : NO. 01-CV-5873

ROBERT UNITIS, PAUL NARDELLA,
WILLIAM BOYLE and **VARIOUS** UNKNOWN
CUSTOMS AGENTS OF THE DEPARTMENT OF :
THE TREASURY, **U.S.** CUSTOMS SERVICE; :
and THE **U.S.** CUSTOMS SERVICE, :
Defendants :

MEMORANDUM AND **ORDER**

McLaughlin, J. March 13, 2003

Joseph Mike has filed a complaint against three law enforcement officers of the United States Customs Service ("Customs"), and Customs itself, alleging various constitutional violations and tortious conduct. The complaint is based on the plaintiff's being stopped and searched for illegal drugs at the Philadelphia International Airport when he returned from Jamaica. The individual defendants have moved for summary judgment on all counts of the complaint; Customs has moved to dismiss the complaint for improper service. The Court will grant in part and deny in part the motion of the individual defendants; the Court will grant Customs' motion.

I. Individual Defendants' Motion

The facts are not in dispute, except as discussed below. Most of the facts come from the petitions of the plaintiff and his girlfriend that were filed with Customs and that are attached as exhibits to the individual defendants' memorandum.

On November 27, 1999, Mr. Mike was a passenger on a flight from Jamaica to Philadelphia. He was accompanied on this return from a vacation by his "paramour," Ms. Tamika Dargan. Exhibits 1 and 2, Defendants' Memorandum In Support of Motion for Summary Judgment (all exhibits to the defendants' memorandum will be referred to as Ex. __). As Mr. Mike and Ms. Dargan approached the baggage claim area to retrieve luggage, they were confronted by Customs officers with a dog. Id. The Customs officers asked Mr. Mike and Ms. Dargan questions about their travel plans while the dog sniffed their luggage.

The officer with the dog was Canine Enforcement Officer ("CEO") Robert Unitis, who had observed the dog "alert" to Mr. Mike and Ms. Dargan. Ex. 3. The dog had been trained to change his behavior when exposed to marijuana, hashish, cocaine and heroin; that change in behavior is called an "alert." Id. CEO Unitis has stated that he observed Mr. Mike tossing a package, which the officer retrieved. Id. The plaintiff denied that he

tossed a package and alleged that defendant Unitis lied when he said he saw the plaintiff toss a package. CEO Unitis told Mr. Mike and Ms. Dargan to go to an area of the Airport called "Secondary," for further Customs processing. Id. He wrote "K-9" on Mr. Mike's customs declaration, designating that the canine had alerted to him. Id.

At Secondary, Mr. Mike and Ms. Dargan were questioned by Inspector Paul Nardella, who knew they were at Secondary because of a canine alert. Ex. 4. Inspector Nardella searched both Mr. Mike's and Ms. Dargan's bags. Id. In Ms. Dargan's bag he found 0.15 grams of marijuana and a small package of cigarette rolling paper. Id.; Exs. 2 and 5. Ms. Dargan admitted to Inspector Nardella that she had smoked marijuana in Jamaica and may have dropped these items into her bag by mistake. Ex. 4.

Supervisory Inspector William Boyle was the supervisor assigned to the inspectors and canine enforcement officers at the Philadelphia Airport on November 27, 1999. Ex. 6. He approved the conduct of pat down searches of Mr. Mike and Ms. Dargan. Id. He approved the search of Mr. Mike because (1) his flight was coming from Jamaica, a 'source country" for drugs; (2) the canine had alerted to Mr. Mike; and (3) CEO Unitis had seen Mr. Mike toss a package which he considered to be suspicious. Id. He approved the search for Ms. Dargan because (1) her flight was

from a source country; (2) the canine had alerted to Ms. Dargan; (3) marijuana had been found in her bag; and (4) she appeared bulky in her mid-section. Id. The pat down searches of Mr. Mike and Ms. Dargan were conducted without Mr. Mike or Ms. Dargan removing any of their clothes except their coats. Id. No further contraband was found. Id.

The package that CEO Unitis said he had seen Mr. Mike toss was retrieved and tested positive as 3.9 grams of marijuana. Ex. 7. When Mr. Mike was informed that the package he had been seen tossing contained **3.9** grams of marijuana, he denied that he had discarded a package containing marijuana. Ex. 1. Mr. Mike was offered the opportunity to pay a mitigated fine of $500.00, but refused to pay and decided to contest the claim. Id.; Exs. 6 and 8. He subsequently, on December 27, **1999**, filed a Petition for Relief. Ex. 1.

Ms. Dargan did not dispute the fact that marijuana and rolling papers were found in her bags. Exs. 2 and 6. Although Ms. Dargan signed a waiver of lawsuit and promissory note to pay the $500.00 on November 27, **1999**, she later repudiated and contested the penalty. Ex. 2. Ultimately, Mr. Mike's penalty was mitigated in full and Ms. Dargan paid the $500.00 penalty. Exs. **9** and **10.**

The entire process at the Philadelphia International

Airport on November 27, 1999, in which Mr. Mike was detained and searched, took some period of time more than 45 minutes. Complaint at ¶ 19.

There are six counts in the complaint: (1) violation of the Fourth and Fourteenth Amendments and 42 U.S.C. §§ 1983, 1986, and 1985(3) by discriminating against the plaintiff because he is African-American; (2) violation of the same provisions by unreasonable search and seizure of the plaintiff; (3) claim under the Federal Tort Claims Act; (4) false imprisonment; (5) negligence; and (6) invasion of privacy.

The plaintiff conceded at oral argument that the tort claims must be dismissed. The essence of the first two counts appears to be a claim that the plaintiff's Fourth Amendment rights were violated by the stop and search and that the defendant was singled out as an African-American for the stop and search.[1]

A. Fourth Amendment Claim

The defendants spent much of their brief arguing that the stop and pat down search of the plaintiff was proper under

[1] There is no Fourteenth Amendment claim here because that amendment applies only to actions by states and not the federal government. The complaint does not state a claim under section 1983 because that statute also requires state action.

Fourth Amendment jurisprudence. At the oral argument on the motion, however, the plaintiff conceded that the stop and pat down search of the plaintiff was legal as a routine border search, for which no probable cause or reasonable suspicion is required. Tr. at 9-10. The Court finds, therefore, that the stop and search of the plaintiff was consistent with the Fourth Amendment. See Bradley v. United States et al., 299 F.3d 197, 201 (3d Cir. 2002) ("[Clourts, including our Court, have long held that routine searches at our nation's borders are presumed to be reasonable under the Fourth Amendment."). See also United States v. Montova de Hernandez, 473 U.S. 531, 538 (1985); United States v. Ramsey, 431 U.S. 606, 616-18 (1977); United States v. Ezeiruaku, 936 F.2d 136, 140 (3d Cir. 1991); United States v. Glasser et al., 750 F.2d 1197, 1201 (3d Cir. 1984), cert. denied sub nom. Erdlen v. U.S., 471 U.S. 1018 (1985) and Gaza v. U.S., 471 U.S. 1068 (1985).

Even if reasonable suspicion were required, it was met here without any consideration of CEO Unitis's statement that he observed Mr. Mike toss a package that was retrieved and found to contain marijuana. The dog alerted to the plaintiff and his girlfriend, and the plaintiff was coming from Jamaica, a source country for drugs. Those facts make out reasonable suspicion. See Bradley, 299 F.3d at 201.

B. Discrimination Claim

Although the plaintiff did not articulate an equal protection claim in his complaint, the Court will consider whether the complaint states a claim for such a violation.

The Third Circuit has held that the same framework adopted for Title VII claims under the McDonnell Douglass-Burdine framework (Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)) is applicable to equal protection claims under the Constitution. Stewart v. Rutgers, the State University, 120 F.3d 426, 432 (1997). That analysis, as modified by Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142-147 (2000), requires first that the plaintiff make out a prima facie case of discrimination. If the plaintiff does so, the defendant must present a legitimate, non-discriminatory reason for the action it took. The defendant must only present a reason for the action, which if believed, would be legitimate and non-discriminatory. After the defendant does that, in order to survive summary judgment, the plaintiff must show that the defendant's stated reason is pretextual, either by showing that it is not credible or by showing that the real motivation was more likely than not discriminatory.

To establish a prima facie case, Mr. Mike must first show that he received different treatment from those similarly situated. Andrews v. City of Philadelphia, **895 F.2d 1469, 1478** (3d Cir. **1990);** Kuhar v. Greensburs-Salem School District, **616** F.2d **676, 677** n. **1 (3d** Cir. **1980).** In this instance, a similarly situated individual would not be a non-Black male, but would be a non-Black male in the plaintiff's situation. See Bradley v. United States, 164 F. Supp. 2d **437,** 447 (D.N.J. 2001), aff'd, **299** F.3d **197** (3d Cir. 2002). Mr. Mike has not even alleged that any person in a similar situation received treatment that was different. The Court is reluctant to grant summary judgment on this claim, however, because there has been no discovery. The Court, therefore, will dismiss this claim but will allow the plaintiff to file an amended comp1aint if he, in good faith, can make an equal protection claim.

C. Other Possible Claims

When the Court asked counsel for the plaintiff at the hearing on the motion what the defendants did that was illegal, counsel for the plaintiff responded:

> What's illegal is presenting Mr. Mike with some false allegation that they observed him throwing a package off the side of an escalator, which they subsequently tested for marijuana, without showing Mr. Mike the actual package or showing Mr. Mike

> the test results that they supposedly had in their possession, keeping him there at that point. From the time of the pat down and from the time that they discovered that he did not have any contraband or drugs on his person, from that point forward I allege that there was illegal conduct, not only presenting him with this package that – or telling him about a package that he supposedly – but asking him to waive his right to sue the U.S. Customs Service if he would just sign a form agreeing not to sue and pay $500.

Tr. at 10.

When asked how that violated the Fourth Amendment, counsel said that it did not but that it violated the Fifth Amendment – the takings clause. There is no Fifth Amendment claim in the complaint. Although the Court is very skeptical of the applicability of the Fifth Amendment to a situation where a customs agent allegedly lies as the plaintiff alleges CEO Unitis did here, and although the Court, in doing its own research, has not been able to discover any viable claim that could be sustained by the plaintiff's version of events, it is reluctant to dismiss the case with prejudice. The Court, therefore, will allow the plaintiff 30 days to file an amended complaint if he believes that he, in good faith, can make a claim based on the allegation that CEO Unitis lied about seeing the defendant toss the bag.

11. Customs' Motion

A plaintiff must serve his complaint and summons upon a defendant within 120 days after the filing of the complaint, or the Court can dismiss the action as to that defendant without prejudice. Fed. R. Civ. P. 4(m).

Fed. R. Civ. Pro. 4(i) provides:

> Serving the United States, Its Agencies, Corporations, Officers or Employees.
>
> (1) Service upon the United States shall be effected
>
> (A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action was brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the Clerk of Court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and
>
> (B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia.

There is no dispute that the Attorney General was properly served. Customs argues that the United States Attorney was not properly served.[2]

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[2] It appears that Fed. R. Civ. P. 4(i)(2)(A) requires that a copy of the summons and complaint should also have been sent by **registered or certified mail to Customs, as well as to the** Attorney General and the United States Attorney. Customs has not raised this, however, so the Court does not dismiss on this ground.

The plaintiff argues that the United States Attorney was properly served by his sending a copy of the summons and complaint to the United States Attorney assigned to the case by first-class mail. It is clear, however, that this is not proper service. The Assistant United States Attorney assigned to the case has not been designated by the United States Attorney in a writing filed with the clerk of the court.

The plaintiff argues alternatively that the Assistant United States Attorney agreed to accept service on behalf of the United States Attorney. The record does not support that argument. In a letter dated January 3, 2002, the Assistant United States Attorney told the plaintiff that she would accept service only for the individual defendants. She executed waivers for those three individuals only. She also explained to counsel for the plaintiff in two letters, one dated June 22, 2001, and the other dated January 3, 2002, that she was not authorized to waive service on Customs and she described the service requirements of Rule 4(i).

When determining whether to dismiss a case under Rule 4(m) for failure to effect proper service, this Court should consider whether good cause exists to extend the time for service. Petrucelli v. Bohringer and Ratzinger, GMBH, 46 F.3d 1298, 1305 (3d Cir. 1995). If good cause does not exist, the

court can dismiss the case without prejudice. Id. The Court can not find good cause here. The Assistant United States Attorney twice explained to the plaintiff's counsel what he needed to do to effectuate service. It has been fifteen months since the filing of the complaint and twelve months since the filing of the motion but the plaintiff still has not served Customs properly. Nor is there a statute of limitations problem. The Court, therefore, will dismiss the case against Customs.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH MIKE, Plaintiff	:	
v.	:	NO. 01-CV-5873
ROBERT UNITIS, PAUL NARDELLA, WILLIAM BOYLE and VARIOUS UNKNOWN CUSTOMS AGENTS OF THE DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE; and THE U.S. CUSTOMS SERVICE, Defendants	:	

ORDER

AND NOW, this 13 day of March, 2003, upon consideration of the Motion for Summary Judgment of Defendants Unitis, Nardella and Boyle (Docket #2), the Plaintiff's Response, these Defendants' Reply, and after a hearing on November 15, 2002, it is hereby Ordered that said motion is Granted in part and Denied in part for the reasons stated in a memorandum of today's date. Defendants Unitis, Nardella and Boyle are granted summary judgment on the tort claims and the Fourth Amendment claim. The plaintiff's other claims are dismissed without prejudice.

Upon consideration of Defendant U.S. Customs Service's Motion to Dismiss (Docket #5), the Plaintiff's Response, this Defendant's Reply, the Plaintiff's Response to the Reply, and after a hearing on November 15, 2002, it is further Ordered that said motion is Granted for the reasons stated in a memorandum of today's date.

The plaintiff may file an amended complaint in accordance with the Court's memorandum of today's date on or before April 13, 2003.

BY THE COURT:

MARY A. MCLAUGHLIN, J.